BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application of Ameritech Michigan	)	CC Docket No. 97-137
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	
Provide In-region, InterLATA Services	)	
in Michigan	)	

OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

Genevieve Morelli
Executive V.P. and General Counsel
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1900 M Street, N.W., Suite 800
Washington, D.C. 20036
202-296-6650

Danny E. Adams
Steven A. Augustino
John J. Heitmann
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036
202-955-9600

Its Attorneys

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SUMMARY

Collectively, the competitive checklist and other provisions of Section 271 require that the local market be open to *all* avenues of potential competition, including (1) facilities-based interconnection, (2) the local exchange platform (using unbundled network elements), and (3) service resale. Of particular importance to the ability of most CompTel members to enter the local exchange market (and to provide alternative exchange access) is that unbundled network elements be provided through the platform approach. A substantial number of carriers would be shut out of the local market if the BOC were required to share its network only with a few carriers that have installed duplicative fiber optic networks, or with other carriers limited to reselling the BOC's service at an avoided cost discount. Instead, for the full benefits of competition to be available, the BOC must also open its network to carriers who begin to provide service with little or no separate facilities, so that they may combine network elements to create efficient and innovative local exchange services of their own design. Therefore, in reviewing Ameritech's checklist compliance, the Commission must be certain that the checklist elements are provided in a way consistent with the platform approach.

Further, in reviewing Ameritech's application, it is critical that the FCC not allow Ameritech to replace actual compliance with the checklist with promises to implement future changes and assurances that unbundled network elements are "available." Section 271 is not an exercise to see what paper promises Ameritech can make in agreements or to the Commission. Instead, Ameritech must actually fulfill each and every requirement, and have that compliance validated by actual experience and demonstrable results.

Actual compliance, not a paper promise, is critical because Congress established Section 271 as the sole incentive for the BOCs to open their local exchange networks to competition. The central quid pro quo of the Act is that a BOC cannot enter the interLATA market unless and until it has relinquished its market power in the local exchange. Creating real local competition will not be easy because the incumbent LEC has overwhelming market power and a powerful incentive to delay or impede the development of that competition. The prospect of interLATA entry is the *only* motivation a BOC has to cooperate in this process, and, for sound public policy reasons, this motivation should not be removed prematurely.

In the instant case, Ameritech's application fails each of the four tests of Section 271. Although it is not necessary for CompTel or the Commission to delineate all of the deficiencies when any one is fatal to the application, the principal defects are as follows:

The Competitive Checklist: Ameritech fails in two ways to satisfy the requirement that it "fully implement" the competitive checklist. First, it is not actually furnishing requesting carriers with all of the checklist items. Ameritech admits that the unbundled local switching ("ULS") element and unbundled transport -- both of which are absolutely critical to use of the local exchange platform -- are not being provided to any carrier at this time. These admissions alone preclude a finding that Ameritech is "providing" all of the items on the competitive checklist. Second, Ameritech is not complying with the substantive requirements of the checklist for the elements most central to competition through the local exchange platform. Ameritech's non-compliance with the checklist includes the following:

- Local Switching -- Ameritech unlawfully prohibits ULS purchasers from acting as the exclusive provider of exchange access services (originating and terminating) to its end users. Ameritech intends to collect access charges from IXCs for traffic routed to or from a ULS end user, unless convoluted and inefficient trunking arrangements are made by the IXC to route these calls exclusively through the ULS

purchaser's trunks. Moreover, as described more fully below, Ameritech denies a ULS purchaser the ability to use the switching element to route traffic to the interoffice network used by Ameritech to transport local calls.

- Unbundled Transport -- Ameritech is unlawfully refusing to provide common interoffice transport, as the FCC's *Interconnection Order* requires. Instead, Ameritech offers only dedicated transport and a "shared" arrangement that may be shared only among CLECs, but not with Ameritech. As a result, Ameritech does not permit carriers to route local traffic over the interoffice trunks used by Ameritech for its own local traffic, thereby denying them access to the features, functions and capabilities of Ameritech's own interoffice transport network.

- Operations Support Systems -- Ameritech does not offer access to OSS at parity with its own access. Most of its systems are still under development and those that have been provided do not work in practice. Ameritech also does not meet the minimal performance criteria that are necessary for a competitor to have reliable access to operations support in order to provide a competitive alternative to Ameritech's local exchange service.

Structural Safeguards: Ameritech has not met its burden of showing that it will conduct the requested authorization in accordance with the structural separation requirements of Section 272. Ameritech omits critical disclosures and leaves unanswered substantial questions about the relationship between Ameritech Michigan, Ameritech Communications, Inc. (its proposed interLATA affiliate) and two affiliates, Ameritech Information Industry Services and Ameritech Long Distance Industry Services. Both of these latter affiliates provide wholesale local exchange and/or exchange access services to and on behalf of Ameritech Michigan, but Ameritech does not reveal its relationship with them nor does it dispel the potential it will attempt to replicate its relationships with its frame relay affiliate to evade the Act's unbundling requirements. Therefore, Ameritech has not shown that it will comply with Section 272's requirements.

Actual Competition: Ameritech has not satisfied the actual competition test embodied in Section 271(c)(1)(A). Although Ameritech in its brief relies on three carriers to demonstrate actual competition -- Brooks Fiber, MFS and TCG -- there is no evidence that two of these carriers (MFS and TCG) are providing service to any residential subscribers. Moreover, the insignificant level of entry by Brooks Fiber, which is confined to a few thousand customers in only a single municipality in Michigan, is not the "tangible affirmation" of competition that the requirement is intended to provide.

The Public Interest: Finally, even if Ameritech had otherwise satisfied Section 271 (which it has not), the Commission cannot find that grant of the application is consistent with the public interest, convenience and necessity. The public interest test operates as a safety valve by giving the Commission the discretion to deny an application even if the first three enumerated criteria have been satisfied. Through the public interest test, the Commission may exercise its traditional expertise in telecommunications and give substantial weight to the Department of Justice's analysis (which is not limited by the Act).

Grant of Ameritech's application is not in the public interest because the competitive risks to the pace and scope of local exchange competition and to the development of viable, cost-based alternatives to BOC exchange access services significantly outweigh the meager benefits that entry by Ameritech might have on the already competitive interLATA services market in Michigan. Congress determined that opening of the local exchange and exchange access markets must precede interLATA entry, and the Commission should neither upset this choice nor remove Ameritech's incentive to comply with the interconnection and unbundling requirements until after it opens its network to competitors and creates a meaningful opportunity for competition to develop.

* * *

For all of the foregoing reasons, the Commission should deny Ameritech's application at this time.

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OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following opposition to Ameritech Michigan's ("Ameritech") application for authority to provide in-region, interLATA services in Michigan.

CompTel is a national industry association representing competitive providers of telecommunications services. Its approximately 200 members offer a wide variety of telecommunications services in markets which have been opened to competition. CompTel and its members are committed to the goal of expanding consumer choice in the local exchange and exchange access markets, where competitive alternatives do not exist today. CompTel was intimately involved in the legislative debates culminating in the Act and has participated extensively in implementation proceedings before the FCC and state PUCs. CompTel strongly supports this Commission's efforts to introduce open and fair competition in local exchange and exchange access services, so that consumers can enjoy the benefits of competition in *all* telecommunications markets. As explained below, Ameritech has not taken the actions required to open the local exchange and exchange access markets in Michigan to meaningful competition, as is required by Section 271 of the Act. Therefore, Ameritech's application must be denied.

I. INTRODUCTION

This is the FCC's only opportunity for a comprehensive review of whether Ameritech Michigan has implemented the Act and the Commission's orders. The Section 271 review process is central to the success of local exchange competition (and ultimately full service competition) because the prospect of interLATA entry is the *only* incentive Ameritech has to cooperate in taking the steps necessary to allow true competition in its local exchange and exchange access markets. The central quid pro quo of the 1996 Act[1] is that Ameritech (like other Bell Operating Companies ("BOCs")) cannot enter the long distance market unless and until it has relinquished its market power in the local exchange. Therefore, the question for this review must be whether the central promise of the Act has been fulfilled: are consumers actually able to choose among local service providers, and will they continue to enjoy the benefits of long distance competition that they take for granted after 13 years of vigorous competition? These questions are at the heart of the competitive checklist, actual competition, and public interest tests that Ameritech's application must satisfy as conditions to interLATA authorization. The Commission must insist upon demonstrable and verifiable proof on each and every one of these prerequisites before it may grant the authority Ameritech requests.

In adopting the telecommunications provisions of the 1996 Act, Congress had one simple, yet ambitious, goal: to end the final monopoly in the telecommunications industry, the local exchange. Congress knew that it could not achieve this goal simply by declaring

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§ 151 et seq.

local markets "open" to competitors. Therefore, it did not stop with eliminating *de jure* barriers to entry, but took action to require ILECs to open their networks and share the economies they developed through a century of government-protected monopoly provision of service.[2] Due to the exorbitant cost of constructing a duplicate local exchange network, local exchange competition must proceed, at least for the near term, through use of the incumbent's facilities, in part or in whole. Just as importantly, however, Congress recognized that for competition to flourish, entrants must have the flexibility to choose only those pieces of the ILEC network they need, and to use them as needed.

In local services, one size does not fit all. Competition will proceed through a number of different fronts simultaneously. Some CLECs will need to interconnect with the ILEC primarily for purposes of exchanging traffic between their customers.[3] Others will need to fill in their networks with local loops and/or other ILEC facilities in order to offer a ubiquitous product.[4] Many more will not have the resources to construct independent facilities at this time, and will need access to unbundled network elements in a platform configuration so that they can engineer their own network using the facilities of the

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[2] *See, e.g.*, 47 U.S.C. § 251(c).

[3] 47 U.S.C. § 251(c)(2); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 181-185 (1996)("*Interconnection Order*"), *recon.*, 11 FCC Rcd 13042 (1996)("*Interconnection Reconsideration Order*"), *petition for review pending and partial stay granted, sub nom. Iowa Utilities Board et al. v. FCC*, No. 96-3321 and consolidated cases (8th Cir., Oct. 15, 1996)("*Interconnection Stay*"), *partial stay lifted in part, Iowa Utilities Board et al. v FCC*, No. 96-3321 and consolidated cases (8th Cir., Nov. 1, 1996).

[4] 47 U.S.C. § 251(c)(3); *See Interconnection Order* ¶ 249-270.

incumbent provider.[5] Finally, pure service resale may provide an initial strategy for many new entrants.[6] Each option must be fully available, or Congress' goal will not be achieved.

Of particular importance to CompTel and its members is that local service facilities be made available in a platform configuration. The ability to obtain and combine unbundled network elements will enable competing carriers to function as LECs in all respects by configuring their own retail products, managing their networks, and providing a full range of retail and carrier services (including originating and terminating access services). This form of entry will be particularly critical to the development of competition outside the urban business center, where construction of duplicative network facilities may be practically and economically infeasible. For most CompTel members, the viability of their initial entry into the local exchange market will depend upon whether a true local service platform is available for their use.

Understandably, incumbent local exchange carriers, and the BOCs in particular, would not voluntarily relinquish their market power. That is why Section 271 conditions something the BOCs have lobbied for since day one -- interLATA market entry -- upon actions they would otherwise have an interest in blocking. Thus, Congress used the classic "carrot and stick" approach to promote the development of competition in the local exchange and exchange access markets. Ameritech's CEO, Richard Notebaert, has acknowledged in press reports that Section 271 provides a BOC's only incentive to fulfill the Act's mandate.

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[5] 47 U.S.C. § 251(c)(3); *See Interconnection Order* ¶ 289-297, 328-341.

[6] 47 U.S.C. § 251(c)(4); *See Interconnection Order* ¶ 865-877.

Commenting on GTE Corp.'s all-out war on Section 251's interconnection obligations, Mr. Notebaert observed,

> [t]he big difference between us and them [GTE] is they're already in long distance. What's their incentive to cooperate?[7]

While the obligations of Section 251 are mandatory, and will be enforced if necessary, Section 271 is the BOCs' "incentive to cooperate" with the path Congress has chosen.

It is critical, therefore, that the Commission adhere to the chronology established in Section 271. The BOC *first* must open its network to competitors and create a meaningful opportunity for competition to develop. Then, and only then, may the Commission authorize the BOC to enter the interLATA market in its own region. The Commission must stand firm in requiring demonstrable and clear evidence, validated by actual experiences, that the statutory prerequisites are fulfilled *before* it will grant an application to provide in-region interLATA services. The reward of interLATA authorization cannot and should not be given absent effective competition for local exchange end users and for exchange access services.

Ameritech's application fails to meet the rigorous standards of Section 271. It fails each of the four tests embodied in the Commission's determination pursuant to Section 271(d). (1) Regarding the competitive checklist, Ameritech's application fails because (a) it is not actually providing at least two of the checklist items, (b) its unbundled local switching and unbundled local transport elements do not meet the Act's requirements, and (c) it does not have Operations Support Systems ("OSS") in place that can satisfy commercially reasonable performance criteria essential for the provision of both resale and unbundled

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[7] "Holding the Line on Phone Rivalry, GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay," *Washington Post*, October 23, 1996, at C12.

network elements. (2) Regarding the actual competition standard, the *de minimis* number of subscribers served by a competitor does not provide the tangible affirmation of actual competition that Congress intended to be present. (3) Regarding structural separation, Ameritech appears to be using its affiliates to evade the Act's pricing and interconnection standards, and has not shown that it will not employ the same scheme with its interLATA affiliate. (4) Finally, the Commission cannot find that grant of interLATA authority is in the public interest because the risk to the pace and development of viable local exchange and exchange competition significantly outweigh the meager benefits that entry by Ameritech might have on the already competitive interLATA market in Michigan.

II. AMERITECH HAS NOT SATISFIED THE COMPETITIVE CHECKLIST

Ameritech's multi-volume filing cannot hide the fact that it has not "fully implemented" the competitive checklist of Section 271(c).[8] This failure requires denial of the application.[9]

A. Relevant Agreements for Purposes of Assessing Checklist Compliance

Ameritech claims that its agreements with its "Section 271(c)(1)(A) competitors" -- Brooks Fiber, MFS and TCG -- satisfy the checklist.[10] These three agreements are the relevant record, therefore, upon which the Commission should base its judgment of

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[8] 47 U.S.C. § 271(c)(2)(B).

[9] *See* 47 U.S.C. § 271(d)(3) (the Commission "*shall not* approve the authorization requested . . . *unless* it finds that [Ameritech has met the requirements of the section]") (emphasis added).

[10] Ameritech Brief at 15.

Ameritech's checklist compliance.[11] Other agreements provided with Ameritech's application (including, as discussed below, its agreements with AT&T and Sprint) are irrelevant for purposes of checklist compliance.

Although Ameritech claims checklist compliance through its agreements with Brooks Fiber, MFS and TCG, it nevertheless contends the Commission should "fill in the gaps" in those agreements with provisions taken from the AT&T and Sprint agreements.[12] Ameritech bases this argument on the presence of a "most favored nations" ("MFN") clause in the Brooks Fiber, MFS and TCG agreements.

Ameritech's use of the MFN clauses to bootstrap portions of the AT&T and Sprint agreements is improper. Ameritech does not claim that either the AT&T or Sprint agreements are, on their own, agreements that comply with the competitive checklist.[13] Therefore, what is (or is not) actually provided to AT&T or Sprint is irrelevant to the evaluation of Ameritech's claims. As used by Ameritech, these agreements are relevant to show only what allegedly is available to Brooks Fiber, MFS, or TCG. Thus, at most, the

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[11] *See Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act,* FCC 96-469 (Dec. 6, 1996) (Application shall "include all of the factual evidence on which the applicant will have the Commission rely in making its findings thereon").

[12] *See, e.g.,* Ameritech Brief at 16-17.

[13] As pertinent to this application, Section 271(d) requires the Commission to find that Ameritech has full implemented the competitive checklist "with respect to access and interconnection provided pursuant to subsection (c)(1)(A)." 47 U.S.C. § 271(d)(3)(A)(i). Because Ameritech is not offering these agreements to satisfy Section 271(d), CompTel presumes that these agreements either have not been implemented or do not provide access and interconnection pursuant to Section 271(c)(1)(A).

MFN clause constitutes Ameritech's "offer" to provide an element, which, as explained in Section II.B, below, is insufficient to demonstrate compliance with the checklist.

In any event, Brooks Fiber, MFS and TCG cannot "fill in the gaps" through the MFN clauses in the way Ameritech uses the AT&T and Sprint agreements. This is the case because the MFN clause does not confer the right that Ameritech suggests, and because Ameritech has obstructed the attempted exercise of MFN rights.

First, the MFN clauses do not confer true "mix and match" rights to these carriers.[14] They allow only the *substitution* of terms contained in a section of another agreement, not the addition of missing elements.[15] If Brooks Fiber, MFS or TCG wishes to add an interconnection provision from the AT&T agreement, it could do so only by giving up the interconnection arrangements it had made concerning the subject matter and taking all the terms and conditions contained in the [AT&T] agreement. This limitation substantially burdens the exercise of MFN rights and provides a disincentive to act under the MFN clauses. It also makes it impossible to combine complementary provisions from two separate agreements (*e.g*, one provision from the AT&T agreement and one from the Sprint agreement), because to obtain one provision, the carrier must give up the other.

Second, Ameritech has obstructed the exercise of even this limited substitution right. Despite Ameritech's grand promises to the carriers and in the Brief, actual practice belies the

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[14] Brooks Fiber Agreement, § 28.15; MFS Agreement, § 28.14; TCG Agreement, § 29.13.

[15] *See, e.g.,* Brooks Fiber Agreement, § 28.15 (allowing Brooks Fiber either to select the other agreement in its entirety or to select "the prices, terms and conditions of the Other Agreement . . . that directly relate to any of the following duties as a whole [*e.g.*, Interconnection, Exchange Access, Unbundled Access, etc.]").

assertion that Brooks Fiber, MFS or TCG need do little more than "assert its MFN rights by sending Ameritech a letter specifying the rates, terms and conditions relating to an interconnection arrangement, unbundled elements or combination, or resale service in another carrier's approved agreement that the requesting carrier is adding to its agreement."[16] In April, TCG attempted to invoke the MFN clause (to add a pricing schedule included in Brooks Fiber's agreement). In a supplemental filing submitted to the Michigan Public Service Commission ("MPSC"), TCG complains that Ameritech is obstructing and unnecessarily delaying the valid exercise of TCG's MFN clause.[17] Ameritech responded to TCG's request, claiming (1) that it needed a "reasonable" (but unspecified) amount of time to "analyze" the request "within the legal requirements established by Section 252(i) and the MFN section of [the TCG] agreement . . .."; (2) that the effectiveness of the new prices would be delayed until the parties could negotiate an addendum "acceptable to both parties," (3) that the availability of the Brooks Fiber rates would expire upon termination of the Brooks Fiber agreement, regardless of the termination date in TCG's agreement, (4) that TCG must accept all other terms and conditions of Brooks agreement it deemed "related," and (5) that "there are other factors which must be considered in analyzing your request."[18] This evidence cautions against reliance on any claims that provisions of the AT&T or Sprint agreements are "available" to Brooks Fiber, MFS or TCG.

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[16] Ameritech Brief at 16-17.

[17] TCG Detroit's Submittal of Supplemental Information Regarding Ameritech's Breach of Interconnection Agreement, attached as Volume 4 to the Ameritech application (p. AM-4-006621 to 6632).

[18] *Id.*

For these reasons, the Commission should disregard Ameritech's reliance on elements or provisions contained in the AT&T or Sprint agreements. Ameritech's satisfaction of the competitive checklist must rest upon its agreements with Brooks Fiber, MFS and TCG. If these agreements do not satisfy the checklist, which as shown below, they do not, then the Commission must deny Ameritech's application.

B. Ameritech Is Not "Providing" Access and Interconnection For Each Checklist Item Because it Admits that No Carrier Is Actually Receiving Unbundled Local Switching or Unbundled Local Transport

Ameritech's application does not even allege that it is actually providing every item on the competitive checklist. In Ameritech's view, it "provides" a checklist item "*either* by actually furnishing the item to carriers that have ordered it *or* by making available that item, through an approved interconnection agreement, to carriers that may elect to order it in the future."[19] Therefore, it freely concedes that it is not providing unbundled switching to *any* telecommunications provider at this time.[20] Also, although Ameritech misleadingly claims that it "furnishes" the remaining checklist items, it admits that it is providing local transport as a *service*, pursuant to its access tariff, not as an unbundled network element (and therefore not pursuant to the Act's pricing standards).[21] Thus, it is not providing unbundled local transport pursuant to the checklist either.

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[19] Ameritech Brief at 19 (emphasis in original).

[20] *Id.* at 15.

[21] *Id.* at 45 (admitting that "no competing carriers have properly ordered unbundled local transport pursuant to their interconnection agreements").

Ameritech's failure to provide these elements requires denial of its application. Section 271 is not an exercise to see what paper promises Ameritech can make in its interconnection agreements or in an application to the Commission. The statute expressly requires that a BOC may satisfy the checklist only if "such company *is providing access and interconnection*" under an approved interconnection agreement.[22] Access or interconnection meets the substantive standards of the competitive checklist if it "includes *each* of [the enumerated criteria]."[23] The plain meaning of this language is clear: Ameritech must actually provide the required elements, not merely make them available.

The structure of Section 271(c) confirms that for a BOC to "provide" a checklist element it must actually furnish it to a competitor, not merely promise to provide it at some future date. Section 271(c)(2)(B) sets forth the requirements for access and interconnection "provided or generally offered" by Ameritech. The phrase "provided *or* generally offered" clearly is a reference to the two potential tracks of 271(c)(1) -- that Ameritech have an agreement with a facilities based competitor ("Track A"), or, if interconnection was not requested by any carrier, that it have an approved statement of generally available terms and conditions ("Track B"). Because Ameritech does not claim that Track B applies here (and rightfully so), the checklist items must be "provided" by Ameritech. If the term "provide" were synonymous with "offer," however, the distinction between Track A and Track B disappears, and the phrase "provided or generally offered" would become redundant.

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[22] 47 U.S.C. § 271(c)(2)(A)(i)(I) (emphasis added).

[23] *Id.* § 271(c)(2)(B) (emphasis added).

If there were any ambiguity in this statutory language, the Conference Report resolves it. As the Conference Committee explained, "The requirement that the BOC is 'providing access and interconnection' means that the competitor has implemented the interconnection request and the competitor is operational."[24] By requiring that a BOC "provide" each checklist item through an agreement, Congress intended that at least one competitor actually be using the items promised in the agreement. This standard cannot be achieved if Ameritech is merely "offering" to provide an element in the future.[25]

Operational implementation provides an important assurance to the Commission. Actual practice will expose limitations and omissions in the network element in a way that mere "availability" cannot. Carriers' experience with Ameritech's OSS demonstrates the wisdom of the Act's implementation requirement for the checklist items. Despite Ameritech's affidavits explaining how OSS is *supposed* to work, Ameritech's systems are so unreliable in practice that Brooks Fiber must supplement the electronic interface it uses for ordering unbundled loops with complete lists at the end of each day in order to confirm

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[24] H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 145 (1996).

[25] The Department of Justice presented a slightly more stringent view of the "offer" standard in its Evaluation of SBC's application for interLATA authority in Oklahoma. Evaluation of the United States Department of Justice at 23, FCC Docket No. 97-121 (May 16, 1997) (contending that the checklist may be satisfied if the element is specifically defined and the BOC is ready as a "legal and practical matter" to provide it, even if it is not in actual use). DOJ's "legal and practical ability" standard, like Ameritech's "offer" standard, does not give adequate effect to Congress' dichotomy between "offering" checklist items through an SGAT and "providing" them through an interconnection agreement. CompTel submits that DOJ's "legal and practical ability" standard might be appropriate for judging whether a BOC's SGAT were sufficient (assuming that Track B were available to a BOC), but that it is no substitute for the actual provision of an item as is required under Track A.

receipt of each order by Ameritech.[26] Moreover, Ameritech refuses to commit to reasonable performance standards for its OSS, and certainly cannot demonstrate that it meets a minimal acceptable level of quality. Because Ameritech and other BOCs have stonewalled on OSS, CompTel joined in a Petition for Expedited Rulemaking requesting that the Commission compel the BOCs to provide OSS that meets commercially reasonable minimum levels.[27]

Ameritech's proposed "available to order" standard leaves open the possibility that an element is not being used by competitors because the offering is deficient and unusable by competitors. The inherent ambiguity in asking the question *why* an entity is not using an element presents substantial opportunities for the BOC to subvert the Act's unbundling standards by offering unbundled elements that are undesirable. Using local switching as an example, Ameritech speculates that carriers may not have ordered this element because "[competitors] must have concluded that they do not need the item to compete successfully in the local market."[28] It is far more likely, however, that local switching is not being purchased because it is not being offered in the way that the Act requires, *i.e.,* in the way that is *useful* to compete successfully in the local exchange and exchange access markets.[29]

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[26] Response of Brooks Fiber Communications of Michigan to Ameritech Michigan's Submission of Additional Information, at 5 (appended to Ameritech's application at Vol.4, pp. AM-4-05885 to 91); *see also, infra,* pp. 24-25 (discussing other deficiencies with Ameritech's OSS).

[27] Petition for Expedited Rulemaking by LCI International Telecom Corp. and Competitive Telecommunications Association (CompTel), CC Docket No. 96-98, May 30, 1997 (*LCI/CompTel Petition*).

[28] Ameritech Brief at 18.

[29] *See, infra*, pp. 16-20.

CompTel's members are very interested in obtaining unbundled local switching from Ameritech, so long as it is provided in compliance with the Act and the FCC's rules.

CompTel believes it is not a coincidence that Ameritech is not providing two of the checklist items most important to the unbundled local exchange platform. Ameritech's strategy all along has been to maintain the highest possible barriers to entry by competing carriers. Its refusal to provide unbundled switching or unbundled transport that complies with the Act is an attempt to block entry through the platform configuration. If successful, Ameritech will raise the cost of potential entry (and limit competition) by requiring carriers to enter only through methods such as the deployment of duplicative fiber optic transmission networks. Such a strategy makes entry economical only for a few carriers, and only in limited geographic areas.

C. The FCC Cannot Find That Ameritech's Prices Meet Sections 251(c)(3) and 252(d)(1) of the Act

Ameritech's claims regarding the rates at which it is offering interconnection and unbundled elements are curious. Although it relies on the Brooks Fiber, MFS and TCG agreements to demonstrate its checklist compliance, it relies on the rates provided in *different* agreements to show that it is providing the checklist items at cost-based rates. However, not only is it improper to separate the checklist items from the prices at which they are offered, but Ameritech cannot show that its rates meet the Act's cost standards.

The Brooks Fiber, MFS and TCG agreements cannot be used for this purpose. Two of these agreements, the Brooks Fiber and MFS agreements, were reached through voluntary

negotiations.[30] Such agreements are not required to comply with the pricing standards of Section 251, and thus may adopt pricing that is not cost-based.[31] As a result, the issue of whether Ameritech is offering rates that met the Act's standards was irrelevant to the MPSC's review of those agreements, and its approval does not constitute a finding of compliance with the Act's pricing standards. Similarly, the third agreement (with TCG), while arbitrated with respect to three issues, contains *negotiated* rates for interconnection or unbundled network elements.[32] Accordingly, these three agreements do not present the Commission with rates which have been found to comply with Section 251(c)(3) or 252(d)(1).

This defect cannot be cured by Ameritech's claims that the rates in the AT&T and Sprint agreements (which, for the most part, were arbitrated) are "available" to Brooks Fiber, MFS and TCG.[33] Even if the Commission were to look beyond the fact that these rates are "available" only through exercise of the MFN clauses (which as shown above may not be relied upon in the manner Ameritech attempts to use them),[34] the MPSC's arbitration decisions establish *interim* rates, which are subject to change pending final review of the cost

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[30] Ameritech Brief at 5.

[31] *See* 47 U.S.C. § 252(a)(1).

[32] Ameritech Brief at 5; TCG Arbitration Order at 2 (appended as Tab 1.7 to Ameritech's application). Mutual traffic exchange rates were arbitrated in the TCG case, but Ameritech's charges for other facilities and services were arrived at through negotiation.

[33] Ameritech Brief at 34-35.

[34] *See, supra,* pp. 7-10.

studies.[35] Therefore, at this time, the Commission cannot determine whether Ameritech's cost studies satisfy the Act's requirements.

In sum, Ameritech is unable to demonstrate that its rates for interconnection and unbundled network elements comply with the pricing standards of the Act. *See* 47 U.S.C. § 271(c)(2)(B)(i)-(ii) (requiring a BOC to provide interconnection and unbundled elements "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)"). The Commission therefore cannot find the rates underlying Ameritech's application to be cost-based at this time.

D. In any Event, Ameritech Does Not Meet the Checklist's Substantive Standards

Each of the above defects are sufficient to require that the application be denied. Even if the Commission were to look past Ameritech's failure to actually provide the checklist items and to demonstrate compliance with the Act's cost standards, however, Ameritech's application would fail because the elements it describes do not satisfy the substantive unbundling requirements established by the Act and the Commissions rules.

1. Ameritech's Unbundled Local Switching Element Does Not Comply with the Act and the Commission's Rules

The importance of unbundled local switching is underscored by the fact that it is included twice in the checklist. It is a "network element" which must be provided in accordance with Section 251(c) and it is a separate checklist item which is required to be

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[35] AT&T Arbitration Order at 4-5, 8 (referring to interim rates established by the arbitration panel) (appended as Tab 1.2 to Ameritech's application).

offered "unbundled from transport, local loop transmission or other services."[36] Unbundled switching gives a carrier access to the entire switching capability provided by the LEC's switch. It "encompass[es] line-side and trunk-side facilities plus the features, functions, and capabilities of the switch."[37] It also includes all vertical features, Centrex functions, and all "customized routing" functions available through the switch.[38] A carrier that purchases the element replaces Ameritech as the subscriber's local telephone carrier and is responsible for providing all switching functions associated with exchange, exchange access and other services. As the FCC explained:

> [A] carrier that purchases the unbundled local switching element to serve an end user effectively obtains *the exclusive right* to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user.[39]

Therefore, the FCC emphasized, a carrier purchasing unbundled switching must provide all switching services used by that switch.[40]

Unbundled switching is essential to the platform approach to providing local exchange and exchange access services. As the Act mandates, unbundled network elements must be provided in a manner which allows its purchaser to combine the element with other elements in order to provide a service of the purchaser's choosing. In order to permit these

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[36] 47 U.S.C. §§ 271(c)(2)(B)(ii) and (vi).

[37] *Interconnection Order* at ¶ 412.

[38] *Id.*

[39] *Interconnection Reconsideration Order*, at ¶ 11 (emphasis added).

[40] *Id.* A carrier may not, for example, purchase switching solely to offer exchange access services reaching the customer.

combinations, a purchaser must have access to the switching function associated with local exchange, exchange access, and all other services it may provide to the subscriber. Without it, a carrier could not create a viable product to offer to subscribers.

The unbundled switching that Ameritech offers does not comply with these standards. The "Unbundled Local Switching" ("ULS") element described in its agreement with AT&T[41] does not allow its purchaser to become the exclusive provider of exchange access services for interexchange traffic originating and terminating with its local exchange customer. Ameritech will allow the ULS purchaser to act as the access provider *only if* the traffic is routed through the ULS purchaser's dedicated trunk port.[42] That is, unless the IXC establishes separate circuits that are used only to access end users served through the ULS element (a circuit that is necessary only because Ameritech refuses to provide common transport as a network element), Ameritech will continue to charge the IXC for Ameritech's terminating access "service" to reach the ULS end user.[43] This policy is in direct contravention of the Commission's rules, which establish the ULS purchaser as the exclusive access provider for the line. Ameritech must permit the ULS purchaser to provide exchange

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[41] AT&T Agreement, Schedule 9.2.3, § 1.0. Notably, Ameritech's agreements with Brooks Fiber, MFS, and TCG do not provide for unbundled switching (see Section 9 of each agreement), so it has not satisfied the switching requirement with respect to any of the three agreements through which it claims to satisfy the checklist.

[42] Edwards Aff. ¶ 116. In addition, Mr. Edwards declares that Ameritech will charge the CCL and 75% of the RIC on these situations. Since the Commission's *First Report and Order* in the Access Charge Reform proceeding (FCC 97-158, rel. May 16, 1997) eliminates the prerequisite for the "interim" arrangement Mr. Edwards describes, the FCC should ensure that Ameritech no longer intends to assess these charges.

[43] *See* Supplemental Direct Testimony of David H. Gebhardt at 15-16, ICC Docket No. 96-0404 (filed April 4, 1997).